SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 164

FURMAN GULICK SPENCER,

Petitioner,

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

FURMAN GULICK SPENCER, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on February 5, 1952.

Opinions Below

The opinions on the original hearing (R. 16-28) are reported at 100 F. Supp. 444. The opinions on the Government's motion for new trial (R. 34-54) are reported at 102 F. Supp. 774.

Jurisdiction

The final judgment of the Court of Claims dismissing the petition (R. 54-55) was entered on February 5, 1952.

Petitioner's motion for rehearing or in the alternative a new trial was denied on April 8, 1952 (R. 56). The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

Question Presented

An Army Regulation provides that "Orders for retirement, having become effective in any case, cannot be revoked or amended."

A statute provides that Reserve officers of the Army on extended active duty who suffer disability in line of duty from disease or injury "shall be in all respects entitled to receive the same pensions, compensation, retirement pay, and hospital benefits as are now or may hereafter be provided by law or regulation for officers * * * of corresponding grades and length of service of the Regular Army."

A further statute provides that in the administration of the foregoing retirement pay provisions "the determination of all questions of eligibility for the benefits thereof, including all questions of law and fact relating to such eligibility, shall be made by the Secretary of War, or by someone designated by him in the War Department, in the manner, and in accordance with the standards, provided by law or regulations for Regular Army personnel."

The question presented is whether the Secretary of War has power, in the absence of a showing of fraud, to reopen the determination of an Army Retiring Board, approved by him, that a Reserve officer is entitled to retired pay, after such determination has been certified to the Veterans' Administration, the paying agency.

Statutes and Regulations Involved

The applicable statutes and regulations are set out in the Appendix, *infra*, pp. 17-18.

Statement

The facts, which were stipulated (R. 5-10) and twice found by the Court of Claims (R. 11-16, 30-34), may be summarized as follows:

Petitioner was a Reserve Officer of the Army on active duty during World War I, and continued to hold his Reserve commission thereafter. He served several short tours of duty between the wars, and entered on extended active duty as a Lieutenant Colonel, Ordnance Department, on March 24, 1941. He was promoted to Colonel on November 25, 1943, and was relieved from active duty by reason of physical disqualification on October 3, 1944. (Fdg. 2, R. 11-12, 30.

The present case arises out of his World War II service, preceding which he was given no less than five physical examinations, as follows:

(a) Petitioner was examined by the Army in Washington on August 14, 1940, at which time he was found to have a right inguinal hernia and arterial hypertension, which, he was advised, could be corrected within one year (Fdg. 3, R. 12, 30).

(b) Petitioner was examined by the Army at Fort Hayes, Ohio, on October 4, 1940, for the removal of this disqualification, and was found to meet the physical requirements for active duty (Fdg. 4, R. 12, 30).

(c) Petitioner was examined by the Veterans' Administration at Dayton, Ohio, on December 9, 10, and 11, 1940, at which time his condition was diagnosed as arterial hypertension. The record shows that on this occasion petitioner stated to the medical examiner that "I get short of breath going upstairs. * * * I have high blood pressure." (Fdg. 5, R. 12-13, 30-31.)

(d) Petitioner was again examined by the Army at Fort Hayes, Ohio, on December 13, 1940, at which time he met the

physical requirements for active duty (Fdg. 6, R. 13, 31). Thereafter upon telegraphic advice from the Army which stated "Physical examination satisfactory," he entered on active duty on March 24, 1941 (Fdgs. 2, 7, R. 12, 13, 30, 31).

(e) Two days after his entry on active duty, on March 26, 1941, petitioner was once more examined by the Army at Fort Hayes, Ohio. He was given a Final Type Physical Examination, which disclosed no disqualifications, and was classified as fit for extended active duty. (Fdg. 8, R. 13, 31-32.)

Thereafter, following over three years of active duty, petitioner, suffering from physical exhaustion (R. 17), was admitted to Crile General Hospital for observation and treatment. On July 6, 1944, he appeared before a retiring board, which heard medical witnesses. In answer to a question by the board as to whether he had had any trouble before being called to active service, petitioner stated "No." The board entered findings that petitioner was suffering from arterial hypertension, that said incapacity was an incident of the service, that it was permanent, and that it originated about January 1944. (Fdg. 9, R. 13-14, 32.)

Following these proceedings, petitioner was relieved from active duty for physical disqualification, effective October 3, 1944, and ordered home (Fdg. 10, R. 14, 32). Meanwhile a new retiring board was convened; that board made the same findings as the earlier board; and its findings were approved by the Secretary of War (Fdg. 11, R. 14, 32-33).

Thereafter on January 12, 1945, petitioner was certified to the Administrator of Veterans' Affairs for retirement pay under the Act of April 3, 1939, *infra* p. 17, in the amount of $362.50 monthly, and he was duly advised of such certification (Fdgs. 12, 13, R. 14-15, 33).

Subsequently, on March 19, 1945, petitioner was advised that in view of additional evidence which had been received

in the War Department, the record of the proceedings of the retiring board was being returned to that board for further consideration, and that the Veterans' Administration had been notified to withhold payments pending completion of the rehearing (Fdg. 14, R. 15, 33). The retiring board reconvened on April 5, 1945; considered the original board proceedings, the records of the Veterans' Administration physical examination of December 1940, and the records of the Army physical examination of December 1940; and again entered a finding that petitioner's arterial hypertension was an incident of the service, originating about January 1944 (Fdg. 15, R. 15, 33). The reconvened retiring board found that although petitioner had suffered from hypertension prior to his acceptance for active service in 1941, that condition had been sufficiently alleviated to warrant his acceptance for extended active duty in 1941, and that the hypertension which caused his disability in 1944 was a new condition which originated while he was on active duty (R. 18). These findings, however, were disapproved by direction of the Secretary of War on May 7, 1945 (Fdg. 16, R. 15, 33-34).

Petitioner requested and obtained review by the Secretary of War's Disability Review Board, which on November 14, 1945, reversed the findings of the three earlier boards, and entered findings that petitioner's incapacity was not an incident of the service, but originated prior to entrance on active duty (Fdg. 16, R. 15, 33-34). Meanwhile, on May 14, 1945, petitioner's certification to the Veterans' Administration had been rescinded by order of the Secretary of War (Fdg. 17, R. 15-16, 34).

Petitioner thereafter sued in the court below to recover his retired pay, less appropriate set-offs (R. 1-5). The facts were stipulated (R. 5-10). The Court of Claims held, on the original hearing, that there was "no evidence in the record that plaintiff was guilty of making any fraudulent

misrepresentations to the initial board" (R. 25-26), and that "the action of the Secretary of War in certifying plaintiff for service-connected disability was final and conclusive and no justification exists for the action of the Secretary in revoking plaintiff's retirement orders" (R. 26). Judgment was accordingly ordered entered for the amount of petitioner's retired pay, less amounts received by way of disability pension from the Veterans' Administration and for reserve retired pay under Title III of the Act of June 29, 1948 (Fdg. 18, R. 16; R. 16, 28).

Two judges dissented, not on the ground that the facts amounted to fraud, but because (R. 27-28), "I recognize that the decision of the court is supported by strong precedents, but I think the time has come to reexamine the precedents and to attempt to develop a doctrine in keeping with current military conditions."

Four months later, however, on the Government's motion for a new trial (R. 28-29), the court below reversed itself, although making identical findings (R. 30-34), and dismissed petitioner's suit (R. 34, 54-55). The judge who changed his mind concurred in the result (R. 40-41)—

> on the ground that the newly discovered evidence was sufficient to justify a reversal of the previous action that had been taken; at least that a court is not justified in the circumstances of this case, in holding that such action was an abuse of the discretion that had been lodged in such officer.

Two new opinions were written by the judges who had previously written, each expanding the views theretofore set forth (R. 34-40, 41-54). The prevailing opinion again made no finding of fraud, but relied in part on an unreported ruling in a United States District Court (R. 40). Petitioner's subsequent motion for rehearing or in the alterna-

tive a new trial (R. 55-56) was thereafter denied (R. 56), without opinion.

Reasons for Granting the Writ

This is not just a pay case.

The ruling below jeopardizes the status of over 35,000 non-Regular officers of the several Armed Forces now drawing retired pay for disabilities incurred in the active service of their country. It contravenes the expressed will of Congress because, on motion for new trial, the court below, reversing its earlier determination herein, has, for reasons purely legislative in character, deemed the applicable statutory scheme unwise. And the final ruling sets at naught the national policy of treating on a parity the Reserve and Regular officers of the Armed Forces, a policy deliberately arrived at after and in the light of decades of unhappy experiences with other attempted solutions.

Moreover, the action of the court below, reversing its original determination, has thrown the law into hopeless confusion. Originally, the court below held in this case and in the related case of *Carlin* (*Carlin* v. *United States*, 100 F. Supp. 451), that the retirement of a Reserve officer could not be set aside in the absence of fraud, any more than that of a Regular officer could be. Thereafter, on motion for new trial in this case, the court below reversed itself, and held the precise opposite. But although the court below thus granted the Government's motion for new trial in this case, it denied it in the *Carlin* case, which still stands as a precedent. It is thus impossible for anyone to know to what extent a Reserve officer's retirement is proof against administrative afterthoughts—and that confusion stems from the confused rulings of the only judicial tribunal in which claims for retired pay can be asserted.

Thus, on either aspect, there is presented a question of public importance which calls for resolution by this Court.

The foregoing assertions do not require extended documentation:

I. It is admitted throughout, as it must be, that the retirement of an officer of the Regular service, once effected, cannot be set aside in the absence of fraud. *Burchard* v. *United States*, 125 U. S. 176; *McBlair* v. *United States*, 19 C. Cls. 528; 19 Op. Atty. Gen. 202, 207-210. By the time petitioner was retired, this rule had hardened into the positive direction of the Army Regulations that "Orders for retirement, having become effective in any case, cannot be revoked or amended." Par. 36(b), AR 605-250, 28 March 1944.[1]

Regardless of whether that regulation, *ex proprio vigore*, applied only to Regular officers, the short answer for purposes of the present case is that it has been twice made legislatively applicable to Reserve officers. The Act of April 3, 1939, as amended, 10 U. S. C. (1946 ed.) 456, *infra*, p. 17, provided that Reserve officers of the Army on extended active duty for over thirty days "who suffer disability * * * in line of duty from disease or injury while so employed * * * shall be in all respects entitled to receive the same pensions, compensation, retirement pay, and hospital benefits as now or may hereafter be provided by law *or regulation* for officers * * * of corresponding grades and length of service of the Regular Army." [Italics added.] And the Act of September 26, 1941, 38 U. S. C. (1946 ed.) 12, *infra*, pp. 17-18, provided that in the administration of the retirement pay provisions of the earlier act "the determination of all questions of eligibility for the

[1] Retirement orders in respect of an individual belonging to a class not entitled by law to retirement of course stand on a different footing. See *Cook* v. *United States*, 101 C. Cls. 782. No such question is presented here.

benefits thereof, including all questions of law and fact relating to such eligibility, shall be made by the Secretary of War, or by someone designated by him in the War Department, *in the manner*, and in accordance with the standards by law *or regulations* for Regular Army personnel." [Italics added.]

These two provisions are dispositive of the present case and require reversal. But we think it may be of assistance to this Court if we review briefly the formulation of the present legislative policy of parity, a policy flouted and wholly set at naught by the final action of the court below in this case.

Disparity between Regulars and non-Regulars, be the latter Militia or Volunteers, National Guardsmen or Reservists, has plagued American military policy from the beginning; indeed, it antedated our existence as a nation.[2] Volumes could be written on the gradual abolition of the disparities, in respect of rank, pay, and eligibility to serve on courts-martial; we forego the temptation, and restrict ourselves to the removal of the inequalities between Reserve and Regular officers in respect of disability protection.

As late as World War I, non-Regular officers of the Army were not granted retirement benefits, but were remitted to the provisions for disability compensation set out in Title III of the War Risk Insurance Act of October 6, 1917, c. 105, 40 Stat. 398, 405 *et seq.* The ultimate inadequacy of these provisions was demonstrated by the necessity for the subsequent legislation that established the Emergency Officers Retired List. Act of May 24, 1928, c. 735, 45 Stat. 735 (38 U. S. C. 581-582). However, the basic

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[2] See 1 Freeman, *George Washington*, 385-386, 388-391, 433-434, 439-440, 443-444; 2 *id.* 1, 133-135, 144-145, 148-149, 153-156, 195, for a discussion of the incidents whereby Colonel Washington, commissioned by Governor Dinwiddie of Virginia, was outranked by Captains holding commissions from the Crown.

law after World War I still provided for disparity: first, Reserve officers of the Army were entitled neither to retirement nor to retired pay (National Defense Act, secs. 37a, 47b; 10 U. S. C. [1940 ed.] 364); second, Army Reservists injured while on active duty were entitled only to hospitalization plus pay and allowances pending such hospitalization. 10 U. S. C. (1934 ed.) 451-455; Act of June 15, 1936, c. 547, 49 Stat. 1507 (10 U. S. C. [1940 ed.] 455a-455e.) The only provision for compensation in the event that Reserve officers on active duty incurred permanent disability on such duty was that contained in the pension laws. See 10 U. S. C. (1940 ed.) 457. Up to 1939, therefore, the protection available to officers of the Army's Reserve Corps was far narrower than that provided for officers of the Regular Army.

In that year, when Congress substantially broadened the authority to order Reserve officers to extended active duty, it equalized the protection for such officers suffering disability in line of duty, and placed them on a parity with Regulars. Act of April 3, 1939, as amended, 10 U. S. C. (1946 ed.) 456, *infra*, p. 17; see partial quotation *supra*, p. 8.[3]

This was the law applicable when petitioner became dis-

[3] The basic legislation was contained in Section 5 of the Act of April 3, 1939, c. 35, 53 Stat. 555, 557. This was amended later in the session to exclude extended active duty with the Civilian Conservation Corps. Act of July 25, 1939, c. 349, 53 Stat. 1079.

A later enactment provided similar benefits for Reserve officers disabled while on extended active duty other than with the Civilian Conservation Corps from February 28, 1925, to place such officers on a parity with those called to active duty after April 3, 1939. Section 1 of the Act of Sept. 26, 1941, c. 425, 55 Stat. 733, 10 U. S. C. (1946 ed.) 456a.

Finally, after the Comptroller General had ruled that the benefits of the basic Act of April 3, 1939, were personal to the individual concerned, Congress provided for the dependents of Reserve officers killed on active duty the 6 months' death gratuity theretofore payable only to Regular Army personnel. Act of Dec. 10, 1941, c. 562, 55 Stat. 796; see S. Rep. 191, H. R. Rep. 1280, both 77th Cong., 1st sess.

abled and under which he was certified to the Veterans' Administration as entitled to retired pay.[4]

Administration of the basic retirement benefits was divided, first by Executive Order (Ex. O. 8099, Apr. 28, 1939, 4 F. R. 1725; Ex. O. 8461, June 28, 1940, 5 F. R. 2436), and then by statute. Section 2 of the Act of Sept. 26, 1941, 38 U. S. C. 12, *infra*, pp. 17-18, provided that while payment of retirement benefits was to be made by the Veterans' Administration, "determinations of all questions of eligibility" were to be made in the War Department, "in the manner, and in accordance with the standards, provided by law or regulations for Regular Army personnel."

It is clear then, from the face of the two statutes, that every substantive and procedural right accorded a disabled Regular officer was to be available to a disabled Reserve officer.[5]

As the Senate Committee on Military Affairs said, reporting favorably the basic 1939 legislation, "The fairness of this proposal is so apparent as not to require argument." S. Rep. 80, 76th Cong., 1st sess., p. 7.[6]

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[4] The basic benefits of the Act of April 3, 1939, as amended, and of its naval counterpart, as to which see page 15, below, were extended to Reservists and National Guardsmen killed or injured while rendering service under competent orders for short periods of time by the Act of June 20, 1949, c. 225, 63 Stat. 201; see S. Rep. 95 and H. R. Rep. 582, both 81st Cong., 1st sess. Prior to 1949, Reservists serving on active duty for periods of less than 30 days were entitled only to such protection as was afforded by the United States Employees' Compensation Act. See Act of July 15, 1939, c. 284, 53 Stat. 1042, 5 U. S. C. (1946 ed.) 797.

It should be added that Title IV of the Career Compensation Act of 1949 (37 U. S. C. [Supp. III to 1946 ed.] 271-285) establishes for the future a disability benefit system for Reservists on an entirely different basis. Even there, however, absolute parity was the aim. "Under this title, Reserves and Regulars, enlisted personnel and officers will all be treated alike." H. R. Rep. 779, 81st Cong., 1st sess., p. 21.

[5] See *infra*, page 15, for the statutory application of the same policy of parity to Reserve officers of the Navy and Marine Corps.

[6] To the extent that, in practice, the retirement procedures, so far as non-Regular officers were concerned, were "applied and administered by public authority with an evil eye and an unequal hand" (*Yick Wo* v.

The opinion of the court below on the original hearing (R. 16-26) recognized and gave effect to the foregoing controlling statutory provisions. The dissenters on the original hearing said (R. 27-28), "I recognize that the decision of the court is supported by strong precedents, but I think the time has come to reexamine the precedents and to attempt to develop a doctrine in keeping with current military conditions."

In other words, the dissenters undertook to rewrite the parity policy enacted by Congress. On the Government's motion for a new trial, one judge changed his mind (R. 40-41), producing a majority for dismissing petitioner's suit, and enabling the prior dissenters to deny relief on purely legislative grounds which completely ignored both the controlling statutory provisions and the legislative policy which those provisions reflected and implemented. Finding, what was never disputed, that the status of a Reservist differs in many respects from that of a Regular, they concluded that while a Regular officer's retirement could not be reopened for new evidence not amounting to fraud, a Reserve officer's retirement could be. This result flies in the face of two explicit statutes and reverses the policy of parity of treatment deliberately selected by Congress in the light of the consistent difficulties that flowed from the earlier policy of disparity of treatment.

II. As has been noted, although the court below reversed itself in the instant case, holding on the Government's motion for new trial that the Secretary could reopen this petitioner's retirement, it denied a similar motion by the Government in the companion case of *Carlin*, adhering to its earlier conclusion in that case (100 F. Supp. 451) that the Secretary could not reopen Carlin's retirement. To

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Hopkins, 118 U. S. 356, 373), Congress provided for administrative review of the cases of officers released from active service for physical disability, but without pay. Section 302(a) of the Servicemen's Readjustment Act of 1944 (38 U. S. C. 693i).

the extent that the changed vote in this case turns on (R. 40) "the circumstances of this case," Reserve officers currently receiving retired pay for disability incurred in active service cannot determine their rights. No rule of law has been pronounced. *Carlin* teaches the irrevocability of retirement determinations; this case proclaims the opposite, or, to the extent that it does not, at least makes the stability of retirement turn, not on rules of law, but on the vagaries of medical opinion. After all, four boards have considered petitioner's case, and three of these concluded that his disability did not exist prior to his active service, but was an incident thereof (Fdgs. 9, 11, 15, 16; R. 13-14, 14, 15; 32, 32-34). Moreover, the three boards closest in time to the point at which petitioner in fact became disabled were the three which decided in his favor. To say, therefore, as the now prevailing opinions do, that it is the earlier medical view rather than the latest one which is a "mistake" (R. 26, 27, 40), is to beg the question with a vengeance.[7]

The resultant confusion is confounded by the circumstance that suits seeking retired pay on the footing that administrative action unilaterally cutting off such pay once awarded is illegal can only be brought in the court below. 28 U. S. C. 1346(d)(2). Yet the prevailing majority in that court in the present case relied, to support its rewriting of the statute, on an unreported precedent in a United States District Court (R. 40)—a tribunal which had no jurisdiction in the premises, as the Court of Appeals in the same Circuit held soon after (*Almour* v. *Pace*, 193 F. 2d 699 (App.

[7] Nor is the issue whether the Disability Review Board is more competent than the court below to determine whether petitioner's disability was or was not an incident of petitioner's military service, as the ultimate majority urged when in dissent on the original hearing (R. 26). It is rather whether the Secretary of War had power, in the absence of fraud, to set aside the concurrent findings of three successive and regularly convened Army Retiring Boards that petitioner's disability *was* an incident of service.

D. C.)). The latter holding, it is scarcely necessary to add, would be apparent on a mere reading of the statute.[2]

Thus the only tribunal with jurisdiction to decide the question at issue has become so enmeshed in its own doctrinal inconsistencies as to preclude discovery of the applicable rule of law or indeed of any rule. The situation is analogous to that obtaining when patent litigation in a particular field is so concentrated in one circuit as to render improbable the occurrence of the conflict of decision ordinarily requisite to review by this Court. See *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47, 50. So here: the question can come up only in one court, and the only conflict of decision is within the same court. The situation is accordingly one wherein review by this Court is necessary, to the end that doctrine may be clarified in a matter affecting literally thousands of individuals.

III. In 1949, when Congress was considering the changed provisions for retirement which became effective on October 1 of that year under the provisions of Title IV of the Career Compensation Act of 1949 (37 U. S. C. [Supp. III to 1946 ed.] 271-285), there had been certified to the Veterans' Administration over 32,000 officers of the Army as eligible to receive retirement pay under the basic 1939 legislation. See H. R. Rep. 583, 81st Cong., 1st sess., p. 16; H. R. Rep. 779, 81st Cong., 1st sess., p. 21. Since the United States Air Force had no independent existence prior to September 1947, this figure includes officers of the former Army Air Forces.

[2] 28 U. S. C. (1948 revision) 1346, "United States as defendant," provides in pertinent part:

> (d) The district courts shall not have jurisdiction under this section of
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> * * * * *
>
> (2) Any civil action to recover fees, salary or compensation for official services of officers of the United States.

The rights of Reserve officers of the Navy and Marine Corps who suffered disability while on extended active duty during World War II are governed by Section 4 of the Act of August 27, 1940, c. 694, 54 Stat. 864 (34 U. S. C. [1946 ed.] 896c D), *supra*, p. 18. This Act provided parity of treatment with Regular Navy and Marine Corps officers similarly disabled, its terms followed the language of the then recently enacted Army provision in the Act of April 3, 1939, and the legislative history shows that the Act of 1940 was patterned after the former statute in order to provide for Reservists of the Naval service protection parallel to that available to Army Reservists and identical to that afforded officers of the Regular Naval establishment. See H. R. Rep. 2498, 76th Cong., 3d sess., pp. 1-2, 6; Sen. Rep. 1947, 76th Cong., 3d sess., p. 7.

If, therefore, a determination that a particular Army or Air Force Reservist is entitled to retired pay in respect of disability incurred in line of duty can be administratively reopened by the military department concerned, so can similar determinations made in respect of Reservists of the Naval services. In 1949, 3273 former Naval Reserve officers and 654 former Marine Corps Reserve officers were drawing retired pay under the Act of August 27, 1940, *supra*, for service connected disabilities. See H. R. Rep. 583, 81st Cong., 1st sess., p. 16; H. R. Rep. 779, 81st Cong., 1st sess., p. 21.

It follows, therefore, that if the decision below stands, the retirement rights of all former Reserve officers of the several Armed Forces, numbering over 35,000, rights which until the shift in view of the court below in this case had been thought to have been authoritatively settled, will have been placed in jeopardy. In those circumstances, review by this Court is not only eminently justified, it is imperatively required.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1952.

APPENDIX

Statutes and Regulations Involved

1. Paragraph 36(b) of Army Regulations 605-250, 28 March 1944, provides:

> Orders for retirement, having become effective in any case, cannot be revoked or amended.

2. Section 5 of the Act of April 3, 1935, c. 35, 53 Stat. 555, 557, as amended, 10 U. S. C. (1946 ed.) 456, provides:

> All officers, warrant officers, and enlisted men of the Army of the United States, other than officers and enlisted men of the Regular Army, if called or ordered into the active military service by the Federal Government for extended military service in excess of thirty days, other than for service with the Civilian Conservation Corps, and who suffer disability or death in line of duty from disease or injury while so employed shall be deemed to have been in the active military service during such period and shall be in all respects entitled to receive the same pensions, compensation, retirement pay, and hospital benefits as are now or may hereafter be provided by law or regulation for officers and enlisted men of corresponding grades and length of service of the Regular Army, including for their dependents the benefits of the Act of December 17, 1919 (41 Stat. 367), as amended [10 U. S. C. 903].

3. Section 2 of the Act of September 26, 1941, c. 425, 55 Stat. 733, 734, 38 U. S. C. 12, provides:

> The duties, powers, and functions incident to the administration and payment of the benefits herein provided are hereby vested in the Veterans' Administration: *Provided*, That in the administration of the retirement pay provisions of the said statute the determination of all questions of eligibility for the benefits thereof, including all questions of law and fact relating to such eligibility, shall be made by the Secretary of War, or by someone designated by him in the War

Department, in the manner and in accordance with the standards, provided by law or regulations for Regular Army personnel: * * *.

4. Section 4 of the Act of August 27, 1940, c. 694, 54 Stat. 865, as amended, 34 U. S. C. (1946 ed.) 855c-1, provides:

All officers, nurses, warrant officers, and enlisted men of the United States Naval Reserve or United States Marine Corps Reserve, who, if called or ordered into active naval or military service by the Federal Government for extended naval or military service in excess of thirty days, suffer disability or death in line of duty from disease or injury while so employed shall be deemed to have been in the active naval service during such period, and they or their beneficiaries shall be in all respects entitled to receive the same pensions, compensation, retirement pay, and hospital benefits as are now or may hereafter be provided by law or regulation for officers, warrant officers, nurses, and enlisted men of corresponding grades and length of service of the Regular Navy or Marine Corps: * * * *Provided further*, that this section shall be effective from September 8, 1939.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 164

FURMAN GULICK SPENCER, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions on the original hearing (R. 16-28) are reported at 100 F. Supp. 444. The opinions on the Government's motion for a new trial (R. 34-54) are reported at 102 F. Supp. 774.

JURISDICTION

The judgment of the Court of Claims dismissing the petition (R. 54-55) was entered on February 5, 1952. Petitioner's motion for a rehearing or a new trial was denied on April 8, 1952 (R. 56). The

petition for a writ of certiorari was filed on June 30, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, in the absence of a finding that petitioner had been guilty of fraud, it was contrary to law or an abuse of discretion for the Secretary of War to reopen the record of petitioner's case before the Army Retirement Board for the purpose of determining whether newly discovered evidence in the records of the Veterans Administration disclosed that petitioner's physical disability had not been incurred "in line of duty".

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations are set out in the Appendix, *infra*, pp. 14-15.

STATEMENT

Petitioner brought this suit in the Court of Claims under Section 5 of the Act of April 3, 1939, 53 Stat. 557, as amended, 10 U.S.C., Supp. V, 456, to recover disability retirement pay for the period from October 4, 1944, to December 31, 1949. He based his claim upon the contention that, in the absence of a showing of fraud, the Secretary of War had no authority to revoke a prior certification of eligibility for such pay. The facts of the case were stipulated (R. 5-10) and may be summarized as follows:

Petitioner was a reserve officer of the Army and entered on extended active duty on March 24, 1941. (Fdg. 2, R. 11-12, 30). Prior to his entry on active duty petitioner was examined at the Army General

Dispensary, Washington, D.C., on August 14, 1940, and found to have arterial hypertension, moderate, which, he was advised, could be corrected within one year. (Fdg. 3, R. 12, 30, P. Ex. 1).[1] Petitioner was again examined on October 4, 1940, at Fort Hayes, Ohio, and found to meet the physical requirements for entry into the Army (Fdg. 4, R. 12, 30). On December 9, 10, 11, 1940, petitioner was examined by the Veterans Administration at Dayton, Ohio. At that time, petitioner stated to a medical examiner of the Veterans Administration: "I get short of breath going up stairs. * * * I have high blood pressure." His condition was diagnosed as arterial hypertension. (Fdg. 5, R. 12-13, 30-31.) On December 13, 1940, petitioner was again examined at Fort Hayes, Ohio, and found to satisfy the physical requirements for active duty (Fdg. 6, R. 13, 31).

After petitioner's entry on active duty on March 24, 1941, he was given a final type physical examination, which disclosed no disqualifications (Fdg. 8, R. 13, 31-32). On July 6, 1944, after approximately three years of active duty, petitioner appeared before an Army Retiring Board. In answer to a question by the board as to whether he had had any trouble before being called to active service, petitioner said "No." The board entered findings on July 6, 1944, that petitioner was suffering from arterial hypertension and that such incapacity was an incident of the service. (Fdg. 9, R. 13-14, 32.)

[1] By stipulation (R. 56), the exhibits have not been printed but have been filed with the Clerk.

Petitioner was then released from active duty, effective October 3, 1944 (Fdg. 10, R. 14, 32). A subsequent retirement board proceeding held on September 14, 1944, produced the same findings. The Secretary of War approved these findings on October 30, 1944. (Fdg. 11, R. 14, 32-33.) Petitioner was notified that he was being certified to the Administrator of Veterans' Affairs under the provisions of the Act of April 3, 1939, for retirement pay (Fdg. 12, R. 14-15, 33), and by letter dated January 12, 1945, he was so certified (Fdg. 13, R. 15, 33).

On February 15, 1945, the Veterans Administration advised the War Department of the record of petitioner's examinations of December 9, 10 and 11, 1940, wherein petitioner had been found to have arterial hypertension prior to his entry on active duty (R. 17-18, 36, D. Ex. 1). Thereafter, on March 19, 1945, petitioner was notified that in view of additional evidence which had been received in the War Department, the record of the proceedings of the Army Retiring Board was being returned to the board for further consideration (Fdg. 14, R. 15, 33). Although the reconvened retiring board again found that petitioner's arterial hypertension was an incident of the service (Fdg. 15, R. 15, 33), this finding was disapproved by direction of the Secretary of War on May 7, 1945 (Fdg. 16, R. 15, 33). Petitioner then requested review by the Disability Review Board, which, after considering the matter on the record, reversed the findings of the earlier boards and entered findings that petitioner's incapacity was not an incident of service,

but had originated prior to entrance on active duty (Fdg. 16, R. 15, 33).

The Court of Claims held, on the original hearing, that the records of the Veterans Administration as to petitioner's physical examinations in December, 1940, did not constitute newly discovered material evidence sufficient to justify reopening the case (R. 24) and that accordingly no justification had been shown for revoking his retirement orders (R. 26). Two judges dissented upon the ground that, in the case of reserve officers, the Secretary of War has the authority upon reconsideration to correct mistakes made in the determination of eligibility for disability retirement pay (R. 26-27). On the Government's motion for a new trial, the Court reversed its prior decision, one judge concurring with the former dissenters upon the ground that the newly discovered evidence was sufficient to justify a reversal of the previous action taken or that, at least, such reversal did not constitute an abuse of discretion (R. 40-41).

ARGUMENT

Misconceiving the pertinent statutes and regulations, the precedents, and the decision below, petitioner urges that only fraud can justify reopening retirement orders of reserve officers. But there is no merit in this view that reserve officers were intended to enjoy vested rights (or to bear unalterable liabilities) predicated upon mistakes. The proceedings of Army retirement boards "are not contests; they are inquiries concerning disability. The purpose is to get at the truth of the matter." *Robertson* v. *Chambers,* 341 U.S. 37, 39. The fact

is that the decisions of the court below have held proper the reexamination of retirement status, in cases of regular as well as reserve officers, on the basis of newly discovered evidence. See pp. 8-9, *infra*. And the decision below is fully sustained on this ground. Moreover, the regulations involved here have been repealed and replaced so that there are likely to be few, if any, further cases like the present one. See pp. 11-12, *infra*. For these reasons, which have led to the Government's decision not to seek certiorari in the related case of *Carlin* v. *United States*, 100 F. Supp. 451 (C. Cls.) (cf. Pet. 7), we believe that review is unwarranted here.

1. Section 5 of the Act of April 3, 1939, 53 Stat. 557, as amended, 10 U.S.C., Supp. V, 456, *infra*, p. 14, upon which petitioner relies, provided that reserve officers of the Army ordered into active military service in excess of thirty days "who suffer disability or death in line of duty from disease while so employed * * * shall be in all respects entitled to receive the same * * * retirement pay, hospital benefits, and pay and allowances as are now or may hereafter be provided by law or regulation for officers * * * of the Regular Army." By Section 2 of the Act of September 26, 1941, 55 Stat. 734, 38 U.S.C. 12, *infra*, pp. 14-15,[2] the administration of the retire

[2] This statute was a codification of the similar provisions of Executive Order 8099, 4 F.R. 1725, as amended by Executive Order 8461, 5 F.R. 2436. Section 1 of the Act of September 26, 1941, 55 Stat. 733, 10 U.S.C. 456a, contained provisions substantially the same as those of the Act of April 3, 1939

ment pay provisions was vested in the Veterans Administration, subject to the proviso that "the determination of all questions of eligibility for benefits thereof, including all questions of law and fact relating to such eligibility, shall be made by the Secretary of War * * * in the manner, and in accordance with the standards, provided by law or regulations for Regular Army personnel." When this case arose, Section 36b of Army Regulations 605-250 (March 28, 1944) provided that "Orders for retirement, having become effective in any case, cannot be revoked or amended." [5]

It is petitioner's contention that Section 36b of A.R. 605-250 applied to reserve as well as regular officers and that this regulation precluded reconsideration of his retirement status except for fraud. While there are compelling arguments against the view that Section 36b was designed for application to reserve officers at all (see opinion below, R. 34-40), it is unnecessary to consider this issue here. For petitioner errs in his contention that only fraud could justify the reopening of retirement proceedings, whether of regular or reserve officers, and the answer to this erroneous argument is dispositive of this case.

[5] Section 36b of A.R. 605-250 was replaced on May 19, 1949, by Section 38b of A.R. 605-246, which has in turn been superseded by the regulations issued under the Career Compensation Act of 1949, 63 Stat. 804, 816-825, 37 U.S.C., Supp. V, 271-285. See pp. 11-12, *infra*.

Ordinarily judicial and administrative determinations may, at least within a reasonable time,[4] be reopened by the adjudicating tribunal for such reasons as fraud or newly discovered evidence. General language of finality such as is contained in Section 36b is not regarded as precluding a result which is often necessary if cases are to be decided justly. That Army retirement proceedings are analogous to judicial was the basis for this Court's decision in *United States* v. *Burchard*, 125 U.S. 176, 179-180, the leading case cited by petitioner.[5] The judicial analogy, of course, supports the decision of the Court of Claims allowing reopening for newly discovered evidence. None of the cases cited by petitioner (Pet. 8) for the proposition that retirement orders of regular officers cannot be set aside in the absence of fraud involved an attempt to set aside such orders on the basis of newly discovered evidence. In fact those cases do not discuss even the possibility of reopening retirement proceedings upon the basis of the discovery of fraud. As stated by the dissenting judges below (R. 46, 52, 54), the Army, in issuing Section 36b, simply gave recognition to the rule established by those cases that orders for retirement of regular officers cannot be cancelled merely because an administrative official sought "not to correct a mistake of fact, but to correct an error

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[4] Here the period between the Secretary's approval and the reopening was only 4½ months. See p. 4, *supra*.

[5] "The action of the President was equivalent to the judgment of an appropriate tribunal upon the facts as found." 125 U.S. at 180.

of judgment." *McBlair* v. *United States*, 19 C. Cls. 528, 538. The newly discovered evidence in this case enabled the Army to "correct a mistake of fact."

The judges dissenting from the decision below thus reasonably recognized that (R. 54) the retirement status of both regular and reserve officers could be reconsidered, not only upon discovery of fraud, but also "upon a showing of * * * substantial new evidence, mistake of law, or mathematical miscalculation." *Carlin* v. *United States*, 100 F. Supp. 451, 453 (C. Cls.). (The quoted opinion in *Carlin* is that of the two judges dissenting here, joined by Chief Judge Jones, who also concurred with the majority in the instant case.) See also *Haas* v. *United States*, 67 C. Cls. 437; *Rollins & Presbrey* v. *United States*, 23 C. Cls. 106; cf. *Cook* v. *United States*, 101 C. Cls. 782. Here, apart from the more difficult and now largely academic (see *infra*, pp. 11-12) question of the application of the repealed A.R. 605-250, Section 36b, the Secretary's action was fully justified by the important evidence of petitioner's physical examination by the Veterans Administration in December, 1940, which had not originally been considered by the retiring boards. At that examination, despite his later denial that he had ever had any trouble before entering active service, petitioner had admittedly stated that he had "high blood pressure" (R. 31, 32). That statement, corroborated by the findings of the Veterans Administration's medical examination, surely served as new evidence of substance meriting reconsideration

as to whether petitioner had been properly placed on retirement pay for a disability which was "an incident of the service."

And so Chief Judge Jones, joining the majority below, concluded (R. 40-41) "that the newly discovered evidence was sufficient to justify a reversal of the previous action that had been taken; at least that a court is not justified, in the circumstances of this case, in holding that such action was an abuse of the discretion that had been lodged in such officer." Thus, contrary to the suggestion (Pet. 7) that the decision below "has thrown the law into hopeless confusion", it is clear that this case and the *Carlin* case turned ultimately on a disagreement as to the sufficiency of the new evidence to support the Secretary's action.[6] That issue, confined to the facts of this case, warrants no further consideration by this Court.

It is settled, of course, that the determination of what constitutes sufficient newly discovered evidence to justify the vacation of a prior order is a matter within the sound discretion of the body issuing that order, and that such a determination will not be disturbed except for abuse of discretion. *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 534-535; *Interstate Commerce Commission* v. *Jer-*

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[6] It appears that the evidence relied upon by the Secretary in reopening Carlin's retirement proceedings had been called to the attention of the original retirement board by Carlin himself, 101 F. Supp. at 453. Such evidence, Judge Jones and the two judges who dissented below held, did not constitute newly discovered evidence justifying the reopening of Carlin's retirement proceedings.

sey City, 322 U.S. 503, 514-519; *Pittsburgh Glass Co.* v. *National Labor Relations Board,* 313 U.S. 146, 161; *United States* v. *Northern Pacific Ry.* 288 U.S. 490, 494; cf. *Royal Insurance Co.* v. *Eastham,* 71 F. 2d 385 (C.A. 5), certiorari denied, 293 U.S. 557; *McIntyre* v. *Texas Company* 48 F. 2d 211 (C.A. 2); *State Bank of New York* v. *Henderson County, Ky.,* 35 F. 2d 859 (C.A. 6), certiorari denied, 281 U.S. 728; *Fitzgerald* v. *Dodson, et al.,* 26 F. 2d 522 (C.A.D.C.). It is equally well established that courts should not intervene to set aside the discretionary acts of the heads of the military establishments. *Denby* v. *Berry,* 263 U.S. 29; *Reaves* v. *Ainsworth,* 219 U.S. 296; cf. *French* v. *Weeks,* 259 U.S. 326; *Creary* v. *Weeks,* 259 U.S. 336. And there is neither disagreement in the court below nor any other reason for review by this Court of the plainly salutary rule that substantial new evidence warrants reconsideration of the status of an officer receiving retirement pay.

2. The case against certiorari is made conclusive, in our view, by the fact that Section 36b of A.R. 605-250, upon which petitioner places great reliance, was superseded on May 19, 1949, by A.R. 605-246 (*infra,* p. 15). Apart from the fact that, as we have shown (*supra,* pp. 7-11), there would be no need in any event to consider in this case the problem of distinctions between reserve and regular officers, Section 38b of A.R. 605-246 eliminated this problem by providing that executed orders, both for retirement (regular officers) and for re-

lief from active duty (reserve officers), "cannot be revoked or amended." Reserve officers were thus assured that orders for relief from active duty following retirement proceedings would be accorded the same finality as that previously given retirement orders of regular officers under Section 36b of A.R. 605-250. Since the new regulation was effective with respect to all "executed orders", it removed any basis for petitioner's contention (Pet. 14-15) that the supposed problem in this case affected the thousands of reserve officers who had theretofore been certified as eligible for retirement benefits.

Moreover, the Career Compensation Act of 1949, 63 Stat. 804, 816-825, 37 U.S.C., Supp. V, 271-285, and the regulations issued thereunder (A.R. 600-450 (November 7, 1949); S.R. 600-450-1) November 7, 1949); S.R. 600-450-5 (July 12, 1951)), have established a retirement and disability benefit system entirely different from that under which petitioner was relieved from active duty. Accordingly, it appears that review by this Court would be of significance only for the relatively few cases in which the records of the retirement proceedings of reserve officers were reopened prior to the issuance of A.R. 605-246 on May 19, 1949.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1952.

APPENDIX

Section 5 of the Act of April 3, 1939, 53 Stat. 557, as amended, 10 U.S.C., Supp. V, 456 provides:

> All officers, warrant officers, and enlisted men of the Army of the United States, or the Air Force of the United States, other than the officers and enlisted men of the Regular Army, or the Regular Air Force who—
>
> (1) if called or ordered into the active military service by the Federal Government for extended military service in excess of thirty days suffer disability or death in line of duty from disease while so employed; or
>
> (2) if called or ordered by the Federal Government to active military service or to perform active duty for training or inactive-duty training for any period of time, suffer disability or death in line of duty from injury while so employed,
>
> shall be deemed to have been in the active military service during such period and shall be in all respects entitled to receive the same pensions, compensation, death gratuity, retirement pay, hospital benefits, and pay and allowances as are now or may hereafter be provided by law or regulation for officers and enlisted men of corresponding grades and length of service of the Regular Army or the Regular Air Force.

Section 2 of the Act of September 26, 1941, 55 Stat. 734, 38 U.S.C. 12, provides:

> That the duties, powers, and functions incident to the administration and payment

of the benefits herein provided are hereby vested in the Veterans' Administration: *Provided,* That in the administration of the retirement pay provisions of the said statute the determination of all questions of eligibility for the benefits thereof, including all questions of law and fact relating to such eligibility, shall be made by the Secretary of War, or by someone designated by him in the War Department, in the manner, and in accordance with the standards, provided by law or regulations for Regular Army personnel: *And provided further,* That no bounty, back pay, pension, or allowance shall be held to have accrued prior to the passage of this section.

Section 36b of A.R. 605-250 (March 28, 1944), provides:

* * * * *

b. Orders for retirement, having become effective in any case, cannot be revoked or amended.

Section 38b of A.R. 605-246 (May 19, 1949) provides:

* * * * *

b. Executed orders for retirement or relief from active duty cannot be revoked or amended.

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